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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STATES OF AMERICA,

Respondent,

vs

ISMAEL FELIPE ARNAIZ

Petitioner,

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

I DID THE COURT ERR IN DENYING THE MOTION OF ISMAEL FELIPE ARNAIZ, TO DISMISS, BASED ON GROUNDS OF DOUBLE JEOPARDY?

II DID THE COURTS DETERMINATION THAT A MISTRIAL WAS REQUIRED, OVER OBJECTION OF ISMAEL FELIPE ARNAIZ, MEET THE STANDARDS OF "MANIFEST NECESSITY"?

III DID THE COURTS DECISION CONFLICT WITH DECISIONS OF THE UNITED STATES SUPREME COURT?

IV IS IT A VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION TO ALLOW THE GOVERNMENT TO RETRY ISMAEL FELIPE ARNAIZ

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PETITION

Petitioner Ismael Felipe Arnaiz seeks a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals which affirmed the denial of his motion to dismiss on grounds of Double Jeopardy.

MEMORANDUM AND DECISIONS OF THE NINTH CIRCUIT COURT OF APPEALS

The Ninth Circuit Court of Appeals issued an unpublished memorandum under date of January 5, 1987, denying the appeal of Ismael F. Arnaiz from the District Court's denial of his Motion to Dismiss on grounds of double jeopardy. The Ninth Circuit's memorandum is enclosed in the appendix to this petition.

A Petition For Rehearing By Panel And Suggestion For Hearing En Banc was rejected by the Ninth Circuit Court on March 5, 1987. This Petition for Writ of Certiorari follows.

JURISDICTION

This case should be reviewed on writ of certiorari since the Ninth Circuit Court of Appeals has decided a question of Fifth Amendment Right that is in conflict with the applicable decision of the United States Supreme Court. The Circuit Court's decision was rendered on January 5, 1987, and the Petition for Rehearing and Suggestion for Review En Banc was denied by the court on March 5, 1987.

The Appellant court decided an issue dealing with Double Jeopardy on grounds that are inconsistent with the view of the United States Supreme Court and other Circuit Courts of Appeals. The settlement of this questions will be important to the public at large by establishing a clear and concise rule of law in regards to the issue of "Manifest Necessity".

Jurisdiction for writ of certiorari is granted by Title 28 United States Code, United States Supreme Court Rule 17, Egan v. City of Aurora, Illinois, 81 S.Ct. 684, 365 U.S. 514, 5 L.Ed2d 741 (1961), and Wilkinson v. United States, 81 S.Ct. 567, 365 U.S. 399, 5 L.Ed.2d 633 (1961).

The Jurisdiction in the Circuit Court of Appeals was Title 21, United States Code 1291, which makes the denial of a motion on grounds of double jeopardy a "final decision", and is immediately appealable and Abney v. United States, 431 U.S. 651, 655-56 (1977).

CONSTITUTIONAL PROVISION

The Fifth Amendment of the United States Constitution states. . .

> "[N]or shall any person be subjected for the same offense to be twice put in jeopardy of life or limb."

United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971) states. . .

> "The Fifth Amendment's prohibition against placing a defendant 'twice in jeopardy' represents a constitutional policy of finality for the defendant's benefit in federal criminal proceedings. A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the Constitution establishes for the conduct of a criminal trial. And society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws."

STATEMENT OF CASE

The Defendant, Ismael Felipe Arnaiz, and twenty-three (23) other individuals were indicted by a federal grand jury in the District of Arizona on March 20, 1984 for various narcotics-related and currency violations.

The indictment alleged the existence of a large narcotics importation and distribution conspiracy spanning four (4) years. Trial commenced on April 2, 1985 in the United States District Court for the District of Arizona before the Honorable Richard Bilby.

The government emphasized to the jury that unindicted co-conspirators Larry Bridges and Russell Crump played an integral role in the investigation leading to Defendants' arrest. The government's evidence also included testimony and reports of personnel from the Drug Enforcement Administration (DEA), Internal Revenue Service (IRS), United States Customs Department (Customs), Florida Department of Law Enforcement (FDLE),

City of Miami Police Department, and the Federal Bureau of Investigation (FBI).

Part of the government's argument and proof was that there was a connection between two alleged narcotics organizations: one, which was called the Barona group which was the subject of an investigation by Marion County, Florida, Sheriff Deputy Patty Lumpkin; and, two, the Arnaiz group which were from Miami, Florida.

Case agent Harold Davidson observed co-defendant Raul Rodriguez meet with co-conspirators Simcha Kelman, Randy Newel, and Jay Betancourt in Tuscon in May of 1982. This meeting was allegedly for the purpose of importation and distribution of cocaine and marijuana on behalf of Luis Villageliu, known as Mr. B., who was a part of the Arnaiz organization. Davidson also investigated a Mr. B. known as Hector Barona, Sr., and his alleged narcotics organization. According to Davidson, Jay Betancourt met with a "Frank" on behalf of a Mr. B. in Phoenix, Arizona, on June 25, 1982. The alleged purpose of this meeting, as established by Davidson through informant Larry

Bridges, telephone communications, and photographic surveillance was to set up a narcotics importation and distribution ring in Arizona. Davidson later established that the two Mr. B. organizations were completely separate and that the "Frank" in Tucson was Frank Pogliani, Hector Barona's right-hand man. Davidson prepared an investigative report on the Luis Villageliu meeting and organization which Sheriff's Deputy Patty Lumpkin of Marion County, Florida used to obtain a wiretap on Hector Barona, Sr. in Marion County, Florida. Neither Davidson, nor the government in any capacity, offered the report which contained this false information to defense counsel. In fact, only through a separate investigation on the part of Frank Rubino, counsel for Bacallao, did the mishap come to light.

On May 4, 1985 Deputy Lumpkin testified to explain the two Mr. B's situation and the fact that a wiretap was authorized based on an affidavit she prepared using false information provided by case agent Davidson.

Harold Davidson testified on May 1 and May 2. On May 1, on cross-examination by counsel

for Defendant Arnaiz, Davidson testified that he was not aware of the details surrounding the killing of two people by Larry Bridges, the government's main informant. Davidson testified that he did not notify authorities in Mexico about the killings because it would not have been helpful to them and because he did not think any United States laws were violated.

On May 4, 1985, Deputy Lumpkin mentioned that Davidson, "within the last thirty days" called her to explain some confusion surrounding the killings and only through subsequent re-examination of Lumpkin on May 15 did counsel for the Defendants and the District Court learn that Davidson called Lumpkin on the night of May 1 during the middle of cross-examination of the case agent.

On May 13, 1985, the trial judge dismissed the case against co-defendant Gregory Clifford after the court discovered that the FBI "obliterated" the sequestration rule. At this time defense counsel moved to dismiss the case against all remaining defendants, due to the prosecutorial

misconduct. The trial judge, in responding to counsel for Defendant Arnaiz's request to specifically admonish Davidson and the remaining government witnesses concerning the Rule, stated that they needed no warning, and if one more Rule violation was discovered, the case would be dismissed against all remaining defendants, with prejudice.

On May 16, the egregious nature of case agent Davidson's Rule violation (withholding of crucial Brady material) and the FBI's withholding and late disclosure of Brady material (the FBI had reports describing co-defendant Raul Rodriguez as a person "obviously not the man in the courtroom") caused the trial judge to terminate the case. The trial judge specifically found violations of Brady and the Rule and at this time declared a mistrial.

The defendants moved for dismissal of the case with prejudice since the trial judge had indicated that he would do so if any more violations occurred. At this time, all defendants objected to the granting of a mistrial sua sponte.

On January 13, 1986 a hearing was held on the motion to dismiss the indictment on grounds

of double jeopardy. Judge Bilby denied the motion stating that on May 16, 1985 there was "manifest necessity" to grant the mistrial.

Appeal to the Ninth Circuit Court on the issue of double jeopardy resulted in denial. Petition for Review and Suggestion for Rehearing En Banc was also denied. This Writ of Certiorari follows.

The jurisdiction of the District Court for the District of Arizona was invoked by the indictment of Ismael F. Arnaiz, charging him with various violations of Title 18, Title 21 and Title 31 of the United States Code.

ARGUMENT

Introduction

This case involved a six-week trial in which the government called approximately 100 witnesses and admitted over 500 exhibits.

The government alleged that one overall conspiracy existed, however, as the evidence unfolded, it depicted two different groups of individuals and two conspiracies.

The evidence and testimony disclosed that case agent Harold Davidson and Deputy Patty Lumpkin of the Marion County Florida Sheriff's Department had, in fact, traded information about the two separate groups.

Information from Davidson to Lumpkin was withheld from the prosecutor and therefore not disclosed to defense counsel as Brady material.

It was further learned that Deputy Lumpkin had used the information she received from Agent Davidson in order to obtain a wiretap for the Hector Barona telephone, a member of the other

group. Deputy Lumpkin obtained the wiretap for the Barona organization in April, 1983. After several more contacts between Agent Davidson and Deputy Lumpkin, Deputy Lumpkin testified that she eventually learned that Agent Davidson was now claiming that the subject Tucson trip was the basis for the wiretap on behalf of the Arnaiz organization rather than the Barona organization as first indicated by Davidson. Deputy Lumpkin learned of this change in information after she obtained her search warrant and after Petitioner and others were indicted in this case.

In addition to the government's failure to disclose the wiretap affidavit of Patty Lumpkin to the defense counsel, the trial court found other violations of Brady. An FBI report delivered to the court on the last day of trial indicted that a description was given of Defendant Rodriguez. This description was completely contrary to the actual appearance of Rodriguez. The report would indicate that perhaps the Raul mentioned several times in earlier testimony and reports was not the

same Raul as the one who was on trial for the offenses alleged.

To exacerbate these problems, there were several violations of the rule of exclusion by the government agents. On May 13, 1985, the trial court dismissed with prejudice the charges against co-defendant, Gregory Clifford. The trial court dismissed these charges after it learned that FBI agents had violated the rule of exclusion by talking with each other about their testimony outside of the courtroom. Mr. Clifford had called these agents as possible witnesses to show that he was, in fact, a police informer and not a co-conspirator. The agents talked about their testimony at length before being called to testify in behalf of Mr. Clifford. Following this revelation the trial court stated on the record that if there were any more violations of the rule of exclusion, the entire case against all of the defendants would be dismissed. The trial court had on the third day of trial warned the prosecutor and Agent Davidson that if there was a violation of the rule, he would lose his case.

On May 15, 1985, it came to light that Agent Davidson had again violated the rule by having a telephone conversation with Deputy Lumpkin during the trial. The defense was able to present the following evidence: On May 1, 1985, Agent Davidson was on the witness stand and being cross-examined about his activities after he learned that the government's second principal informant, Larry Bridges, had possibly murdered two Americans in Mexico. Agent Davidson testified that after he learned of this information, he immediately telephoned Agent Lumpkin in Florida concerning that information. Actually, Agent Davidson did not relate the information concerning the murders to Deputy Lumpkin until May 1, 1985, at approximately 11:00 P.M. Tucson time (approximately 2:00 A.M. Miami time). Agent Davidson, after testifying on May 1 in Tucson, called Deputy Lumpkin in Miami and discussed the testimony concerning the murders by Larry Bridges.

Deputy Lumpkin acknowledged to the trial court that Agent Davidson had called her late that night and told her that she may be a witness and

gave her additional information about the murders committed by Larry Bridges. Agent Davidson also told Deputy Lumpkin during that late night telephone conversation that she would probably be questioned about her information concerning the Florida wiretap affidavit. Agent Davidson attempted to explain his late night call by claiming that he was merely returning an earlier call made by Deputy Lumpkin. The District Court found that Agent Davidson's call to Deputy Lumpkin during the trial was, indeed, a violation of the rule of exclusion.

On May 16, 1985, the trial court declared a mistrial over defendants' objections. The Ninth Circuit Court of Appeal has upheld the action of the trial court.

The present case is appropriate for a hearing by this court because it is one of great guarantee that a defendant not be placed twice in jeopardy. The issues posed in the appeal and the petition for re-hearing by panel and en banc should

be of gravest concern to district judges, appellate judges, and all who favor the preservation of constitutional liberty.

The constitutional guarantee against being placed twice in jeopardy is a fundamental one, and the burdens of a double trial also impinge other constitutional guarantees of effective assistance of counsel, of trial by jury, of effective cross-examination and of meaningful due process.

The importance of this question should not be hidden from scrutiny by an unpublished memorandum opinion, but should be evaluated in the solvent of judicial and public opinion. If constitutional liberties are to be diluted by judicial decision, then this dilution should be in the open for all to see.

The important question to be resolved is whether the standard of "manifest necessity" is really the standard to be applied in the Ninth Circuit. If a trial judge must apply this standard in declaring a mistrial over a defendant's objection, then this standard should not be nullified by the subterfuge of a standard of review, which allows a

district judge to imagine a rationale to justify a patently irrational decision.

On the day of the mistrial the trial court did not find "manifest necessity", he specifically found violations of Brady and the Rule.

I LIMITED SCRUTINY IS NO SCRUTINY, A TRIAL COURT SHOULD NOT BE ALLOWED TO RATIONALIZE A VIOLATION OF THE CONSTITUTION, RATIONALIZATION IS IRRESPONSIBLE:

The violation of any law, even the United States Constitution, may be rationalized by those who violate it. Limited scrutiny on a rational basis standard is no scrutiny. But even the limited scrutiny standard rationally requires that the standard be exercised responsibly, and to contrive a justification over counsel's objection under the facts of the present case was irresponsible.

Responsibility involves being called upon to answer for one's acts or decisions, to fulfill one's obligations, and to choose between right and wrong. A contrived answer or excuse is none at

all. A superficial review of a double jeopardy claim is no review. A statement that "manifest necessity" compelled a mistrial, in light of the facts that it clearly did not, is prevarication, and to deprive a presumably innocent man of the constitutional guarantee against being placed twice in jeopardy is wrong.

The manifest necessity standard was first announced by the United States Supreme Court in United States v. Perez, 22 U.S. (9 Wheat) 579, 580, 6 L.Ed. 165 (1824):

> "We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. . ."

The standard of review for the granting of a mistrial is whether the district court abused its

discretion. United States v. Davis, 663 F.2d 824, 833 (9th Cir. 1981); Cawley, 630 F.2d at 1348. The double jeopardy clause of the Constitution may preclude the retrial of a defendant if a mistrial has been declared without the consent of the defendant and in the absence of a manifest necessity. Arizona v. Washington, supra. As long as the record reflects a manifest necessity, it is not essential that the district court state that the mistrial is being declared due to a manifest necessity. Washington, 434 U.S. at 517-518.

II THE DECISION IS CONTRARY TO THE UNITED STATES SUPREME COURT STANDARD PERMITTING MISTRIAL ONLY IN EXTRAORDINARY AND STRIKING CIRCUMSTANCES

Discretion to discharge a jury before it has reached a verdict is to be exercised only in very extraordinary and striking circumstances, Downum v. United States, 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100.

The record supports the facts that the judge did not apply this standard to the instant case.

The opinion of the Ninth Circuit Court filed under date of January 5, 1987, at page 4, states. . .

> "Although the matter is not free from doubt, we find that the requisite manifest necessity existed in this case. The district judge found that the violations of both Brady and the witness sequestration rule, although probably good faith mistakes, affected the defense lawyers' ability to defend their clients, and that there was no way he could cure the resulting prejudice. Under these circumstances the judge exercised sound discretion in declaring a mistrial."

If this court found doubt and that the actions of the government did affect the defense lawyers' ability to defend their clients, how could the judges decision be in compliance with the U.S. Supreme Court's decision in Downum?

In Downum the Supreme Court stated,

> "We resolve any doubt in favor of the liberty of the citizen, rather than exercise what would be an unlimited uncertain and arbitrary discretion."

III WHERE A MISTRIAL IS DECLARED BECAUSE OF ERRORS OR OMISSIONS BY THE COURT OR THE GOVERNMENT RATHER THAN MATTERS BEYOND THE CONTROL OF EITHER, THE STANDARD OF REVIEW IS STRICT SCRUTINY

The panel decision relies upon Arizona v. Washington, 434 U.S. 497, (1978) and attempts to justify the application of "Limited Scrutiny". In Arizona, mistrial was declared because of improper conduct by the defense. In the present case, the judge declared a mistrial based on the conduct of the government.

The Court stated:

> "All right. It is the finding of the Court that there has been violation of both Brady and the Rule in this case.
>
> The materials of the FBI file which show that Mr. Clifford had described Mr. Rodriguez as a six foot one, 220 pound man, when he is approximately five foot eight and 150 pounds are obviously Brady material.
>
> Likewise, the Lumpkin affidavit constituted Brady material, and was available at least during the Spring, sometime between March and June of 1984, and should have been produced.

> Agent Davidson's talk with Detective Lumpkin, although the Court finds that it was not done with any ulterior or bad motive, nonetheless constituted a violation of the rule.
>
> I have tried to prepare this with what I did in the Knoll case, and I find that in Knoll I was able to cure it by limiting such matters to the tape, but that rebounded to the Defendants in many ways.
>
> Here there is no way that I can do that, and I don't believe that Defendants should have to bear the burden of mistakes, whether in good or bad faith, and I find in this instance, I think they were probably just good faith mistakes, but nonetheless they were mistakes. They were mistakes that affect a lawyer's ability to defend his client. (RT 5/16/85 2-3)."

Conduct by the government is within both the court's and the government's control. Certainly this type of conduct should not be allowed. Sanctions should be imposed against the government and surely not be utilized as a justification for denying a defendant his constitutional rights.

IV THE PANEL DECISION IS CONTRARY TO THE REASONING IN OTHER APPELLATE DECISIONS WHICH HAVE CAREFULLY BALANCED THE NEED FOR A MISTRIAL AGAINST THE RIGHTS OF THE DEFENDANTS

In United States v. Smith, 621 F.2d 350 (9th Cir.) the Ninth Circuit Justices Thornberry, Choy and Pragerson, stated:

> "When a court, in the absence of manifest necessity declares a mistrial, without the defendant's consent, the double jeopardy clause forbids retrial."
>
> "The record gives no indication that the court here even considered the possibility of a continuance before ordering a mistrial. Since the court did not consider, or have before it the facts necessary for a thorough consideration of, an obvious alternative to a mistrial, we cannot say that there was a 'manifest necessity' to terminate the trial at that time."

In United States v. McKoy, 591 F.2d 218 (3d Cir. 1979) the Third Circuit speaks to the considerations that must be given the Defendant:

> "The Supreme Court recently enumerated some of the significant interests served by the Double Jeopardy Clause in the court's sua sponte declaration of a mistrial over a defendant's objection.

Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendants' valued right to have his trial completed by a particular tribunal. The reasons why this 'valued right' merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation or wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutory is entitled to one, and only one, opportunity to require an accused to stand trial. Arizona v. Washington, 434 U.S. 497, 503-505, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)."

"Under the Court's analysis in Jorn, supra, the government generally must demonstrate that, under the circumstances confronting the trial judge, he had no alternative to the declaration of a mistrial. 400 U.S. at 487, 91 S.Ct. 547. See also Arizona v. Washington, supra, 434 U.S. at 515-16, 98 S.Ct. 824; and only by considering the exhausting all other possibilities can the judge ensure that the defendant has received the full protection of the trial court, our duty is to see that alternatives to declaring a mistrial were completely canvassed. See Dunkerlyey v. Hogan, 579 F.2d 141,

146-47 (2d Cir. 1978); United States v. Grasso, 552 F.2d 46, 52 (2d Cir. 1977); United States v. Tinney, 473 F.2d 1085, 1089 (3d Cir.) cert denied, 412 U.S. 928, 93 S.Ct. 2752, 37 L.Ed.2d 156 (1973)"

CONCLUSION

It is respectfully submitted that the trial judge's decision to grant sua sponte a mistrial was done so without the consent of Mr. Arnaiz and was predicated upon the judge's erroneous conclusion that "Manifest Necessity" existed for the mistrial.

The judge should have dismissed this case due to the governmental misconduct which is what the trial judge stated on May 16, 1985. Timely motions to dismiss based on double jeopardy grounds were filed. When the trial judge denied these motions after hearing on January 13, 1986, he stated that manifest necessity now existed. This rational is in retrospect and there was not "Manifest Necessity" to mistry this case on May 16, 1985. The court now tries to justify its decision by saying the defendant's attorney conduct was

unprofessional. The court had other alternatives, but abused its discretion in granting the mistrial.

This court should review the appeal of the Defendant, look at the issues again and see the facts and case law that has been overlooked and reverse the decision rendered on January 5, 1987.

Besides being petitioner's last resort, this court is the only tribunal that can make a final determination concerning the application and the rights guaranteed a citizen under the United States Constitution.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be issued to vacate and/or to review the decision of the Ninth Circuit Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing on this 4th day of May, 1987 was mailed to:

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APPENDIX

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I ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC (NINTH CIRCUIT)

II MEMORANDUM DENYING APPEAL (NINTH CIRCUIT)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	Nos. 86-1034,
	)	86-1035,
v.	)	86-1036,
	)	86-1038,
ALFREDO MOYA, RAUL ALFONSO RODRIGUEZ, ISMAEL FELIPE ARNAIZ, NELSON BACALLAO, STEPHEN FROMM,	)	86-1075,
	)	ORDER
Defendants-Appellants.	)	

Before: WRIGHT, SNEED, and KOZINSKI, Circuit Judges.

The panel as constituted in the above cases has voted to deny the petitions for rehearing and to reject the suggestions for rehearing en banc, filed January 20, 1987, for appellant Rodriguez in Case No. 86-1035, and for appellant Arnaiz in Case No. 86-1036.

The full court has been advised of the suggestions for en banc rehearing, and no judge of the court has requested a vote on them. Fed. R. App. P. 35(b).

The petitions for rehearing are denied, and the suggestions for rehearing en banc are rejected.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, Cross-Appellant. v. ALFREDO MOYA, RAUL ALFONSO RODRIGUEZ, ISMAEL FELIPE ARNAIZ, NELSON BACALLAO, STEPHEN FROMM, Defendants-Appellants. Cross-Appellees.	)	Nos. 86-1034, 86-1035, 86-1036, 86-1038, 86-1075, DC# CR-84-061-RMB MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Richard M. Bilby, Chief District Judge, Presiding
Argued and Submitted November 10, 1986
San Francisco, California

Before: WRIGHT, SNEED, and KOZINSKI, Circuit Judges.

Five codefendants appeal the district court's denial their motions to dismiss their indictments on double jeopardy grounds. In a companion

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

case, the government appeals the district court's order regarding a sanction for a violation of the Jencks Act. We affirm the district court's grant of a mistrial rather than a dismissal and the district court's sanction order limiting testimony.

I.

FACTS AND PROCEDURAL BACKGROUND

On March 20, 1984, the five codefendants and nineteen others were charged in a sixteen-count indictment. They were charged with various controlled substance and currency violation that stemmed from an alleged conspiracy to import and distribute cocaine, methaqualone, and marijuana. During the course of the trial, the district court found that the government violated the witness sequestration rule on three occasions. The court also found that the government committed two violations of Brady v. Maryland, 373 U.S. 83 (1963), which requires the government upon specific request to disclose evidence favorable to the accused. The court concluded that the Brady violations "were probably just good faith mistakes,"

but that they were of the type that hurt the defense.

It further ruled that the government had violated Jencks Act, 18 U.S.C. § 3500. The violation occurred in the following manner. The government attorney and a case agent took notes of an interview with Thomas Knoll. Knoll had entered into plea agreement in which he agreed to cooperate with the government in two unrelated matters, and to discuss the instant case with the prosecutor. After an initial interview between Knoll and the government attorney, Knoll's attorney requested that a recording be made for Knoll's protection. The government attorney, going through his notes, summarized their previous discussion on tape. Knoll stated that the attorney's summary was accurate. The notes of the interview were subsequently lost. Later, Knoll agreed to testify in the instant case. The district court ruled that Knoll had, in the recording, adopted the notes as his statement within the meaning of the Jencks Act. The judge sanctioned the government by limiting Knoll's

testimony to items covered in the recording. The government appeals this sanction order.

On May 16, 1985, the district court sua sponte granted mistrial because of manifest necessity. In a minute order, the court cited government violations of Brady, the Jencks Act, and the witness sequestration rule as reasons for declaring the mistrial. At a hearing on January 13, 1986, the court stated that defense counsel misconduct contributed to the mistrial decision. After the declaration of a mistrial, the defendants moved for dismissal on grounds of double jeopardy. The court denied their motion, and they appealed.

II.

DISCUSSION

A. Double Jeopardy

In a jury trial jeopardy attaches when the jury is empaneled and sworn. Crist v. Bretz, 437 U.S. 28, 29 (1978). However, reprosecution is not barred if the trial was terminated because of "manifest necessity." Arizona v. Washington, 434 U.S. 497, 505 (1978). The "words [manifest necessity] do not describe a standard that can be applied

mechanically or without attention to the particular problem confronting the trial judge." Id. at 506. The Court has stated that there are "degrees of necessity," id. at 506, and that the degree of deference to be given the trial judge's declaration of a mistrial varies according to the circumstances of each case, id. at 507-10. On the one hand, decisions where the accused claims the mistrial was intentionally caused by the prosecution are strictly scrutinized; on the other hand, a trial judge's decision that a mistrial is required because of a deadlocked jury or possible juror bias is given great deference. Id. at 507-11; see United States v. Jarvis, 792 F.2d 767, 769 (9th Cir.), cert denied, 107 S. Ct. 182 (1986). This case falls somewhere between these two ends of the spectrum. Along the spectrum of trial problems that may warrant a mistrial the difficulties that gave rise to the mistrial in this case falls within an area in which the trial judge is entitled to exercise his sound discretion.[1] See United States v. Jorn, 400 U.S. 470, 485-87 (1971) (plurality opinion),

modified on other grounds, Oregon v. Kennedy, 456 U.S. 667, 672-78 (1982).

Although the matter is not free from doubt, we find that the requisite manifest necessity existed in this case. The district judge found that the violations of both Brady and the witness sequestration rule, although probably good faith mistake affected the defense lawyers' ability to defend their clients, and that there was no way he could cure the resulting prejudice. Under these circumstances the judge exercised sound discretion in declaring a mistrial.

The defendants understandably insist that they should not be retried because government misconduct was the primary cause of the mistrial. The Supreme Court, however, has refused to provide the shield of double jeopardy when a mistrial is due to mistakes of the government, United States v. Jorn, 400 U.S. at 486, except when the declaration of mistrial was "on the basis of a rule or a defective procedure that would lend itself to prosecutorial manipulation," Illinois v. Somerville, 410 U.S. 458, 464 (1973). Given the absence of

intentional prosecutorial misconduct and the prosecutor's plea for the case to go to the jury, we conclude the prosecutorial lapses do not lend themselves to "prosecutorial manipulation." We hold that the declaration of a mistrial rather than a dismissal was proper.

We also note that the conduct of some of the defense attorneys, although not cited as a ground for the court's declaration of a mistrial until nine months after the mistrial was granted, was unprofessional, to say the least. The record reveals that, on approximately thirty occasions, the prosecutor complained to the trial court of the heckling by certain defense counsel during the prosecutor's arguments to the court. We emphatically disapprove of the misconduct of certain defense counsel in this case. Attorneys of defendants charged with crimes have a great stake in maintaining the fairness of trials; they cannot expect that society will long tolerate trials generally unfair to the state. Defense counsel misconduct contributed to the manifest necessity for a mistrial.

B. Sanction Under Jencks Act

The government raises two issues on appeal from the Jencks Act sanction. It argues, first, that the prosecutor's notes, taken during the interview, were never adopted by the witness and thus do not constitute Jencks Act material. The government also argues that even if the notes were Jencks Act material, the sanction for the government's violation of the Jencks Act constitutes an abuse of discretion. We have jurisdiction under 18 U.S.C. § 3731 to decide these issues because we find that retrial of the defendants would not violate the double jeopardy clause. See United States v. Layton, 720 F.2d 548, 553-54 (9th Cir. 1983), cert. denied, 465 U.S. 1069 (1984).

A trial judge's decision that interview notes are a witness's own statement is a question of fact. We should not disturb his finding unless it is clearly erroneous. United States v. Goldberg, 582 F.2d 483, 486 (9th Cir. 1978), cert. denied, 440 U.S. 973 (1979), modified on other grounds, United States v. Shaffer, 789 F.2d 682, 687-88 (9th Cir. 1986). The standard of review employed with

respect to most rulings on Jencks Act issues is abuse of discretion. United States v. Miller, 771 F.2d 1219, 1229 (9th Cir. 1985). That is also the standard for reviewing the imposition of sanctions. United States v. Valencia, 656 F.2d 412, 415 (9th Cir.), cert. denied, 454 U.S. 877 (1981).

The Jencks Act defines a "statement" as "a written statement made by [a] witness and signed or otherwise adopted or approved by him." 18 U.S.C. § 3500(e)(1). The Supreme Court has held "statements" of a witness that are written by a government attorney are within the scope of the Jencks Act. Goldberg v. United States, 425 U.S. 94, 98 (1976). Thus the notes can be a "statement" under 18 U.S.C. § 3500(e)(1).

Although the prosecutor's notes were not signed by Knoll, the trial judge ruled that Knoll had "otherwise adopted" these notes. It was not error to so rule. In determining whether a statement has been adopted by a witness it is important to ascertain whether the notes were read back to the witness. United States v. Goldberg, 582 F.2d

at 487. Here, the recording consisted of the government attorney doing precisely that.

The district court sanctioned the government by limiting Knoll's testimony to items contained in the tape. The government argues that the sanction is unduly harsh because the loss of the notes was unintentional, and the status of Knoll as a witness was unanticipated at the time of of the interview.

The Jencks Act authorizes the trial judge to strike the testimony of a witness when the government elects not to comply with an order of the court. 18 U.S.C. § 3500(d). The court is required, in making its decision whether to strike a witness's testimony, to consider the culpability of the government and the injury resulting to the defendants. United States v. Sterling, 742 F.2d 521, 524 (9th Cir. 1984), cert. denied, 105 S. Ct. 232 (1985). The trial judge in this instance considered the lack of government culpability and lack of prejudice to the defendants and then imposed a sanction less harsh than that authorized by the Jencks Act. His ruling was not an abuse of

discretion. We therefore affirm the district court's order limiting Knoll's testimony to the subjects covered in the tape-recorded statement.

AFFIRMED.

FOOTNOTE

1. The "sound discretion" standard has its origins in Mr. Justice Story's classic formulation of the test for manifest necessity. See United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824).

Supreme Court, U.S.
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Nos. 86-1842 and 86-1998

In the Supreme Court of the United States

OCTOBER TERM, 1987

ISMAEL FELIPE ARNAIZ, PETITIONER

v.

UNITED STATES OF AMERICA

NELSON BACALLAO AND STEPHEN FROMM, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly declared a mistrial because of improprieties committed by the government and the defense.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (86-1998 Pet. App. 1-13) is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1987. A petition for rehearing in No. 86-1842 was denied on March 5, 1987, and the petition in that case was filed with this Court on May 4, 1987. A petition for rehearing in No. 86-1998 was denied on April 14, 1987, and the petition in that case was filed with this Court on June 12, 1987.

[1] "Pet. App." refers to the appendix to the petition in No. 86-1998 unless otherwise indicated.

STATEMENT

In an indictment returned in the United States District Court for the District of Arizona, petitioners and 21 co-defendants were charged with various controlled substance and currency violations. The charges related to petitioners' participation in a conspiracy to import and distribute cocaine, methaqualone, and marijuana. All three petitioners were charged with conspiracy to import those substances, in violation of 21 U.S.C. 963, and conspiracy to distribute them, in violation of 21 U.S.C. 846. Additionally, petitioner Arnaiz was charged with engaging in a continuing criminal enterprise, in violation of 21 U.S.C. (& Supp. III) 848; two counts of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); interstate travel to promote a narcotics business, in violation of 18 U.S.C. 1952; two counts of using a telephone to facilitate the commission of a narcotics offense, in violation of 21 U.S.C. 843(b); failure to file a currency transaction report, in violation of 31 U.S.C. 5313; and conspiracy to defraud the Internal Revenue Service, in violation of 18 U.S.C. 371.

1. At the trial of petitioners and six of their co-defendants the government presented evidence that, between May 1980 and March 1984, petitioners and their co-defendants participated in a large-scale conspiracy to import cocaine, marijuana, and methaqualone into the United States and to distribute those substances.[2] Petitioner Arnaiz was alleged to be the ringleader of the operation, and co-defendants Moya and Rodriguez were alleged to be his lieutenants. One of petitioners' principal defenses was that the evidence failed to demonstrate the existence

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[2] Two of the co-defendants, Alfredo Moya and Alfonzo Rodriguez, have previously filed petitions for a writ of certiorari, which are now pending before the Court. See *Moya* v. *United States*, No. 86-6591; *Rodriguez* v. *United States*, No. 86-6637.

of the broad conspiracy charged in the indictment. At most, the defense maintained, the evidence showed that various defendants participated in smaller importation conspiracies during the relevant period and that, as the result of an October 22, 1981, dispute, a group of the defendants severed their ties with the Arnaiz organization and engaged in their own drug smuggling activities.

As part of its case, the government presented evidence that in May 1982, Rodriguez and several others flew from Florida to Arizona to find landing strips to use in connection with petitioner Arnaiz's smuggling operations (5/1/85 Tr. 17-31). The defense maintained that those activities were not conducted on behalf of the Arnaiz organization but on behalf of a separate narcotics-smuggling organization run by one Hector Barona.

Shortly before the trial was to conclude, the prosecutor produced an affidavit that a Marion County, Florida, sheriff's deputy had executed in connection with a wiretap application for Barona's telephone. The affidavit, which had been in the possession of the DEA agent conducting the investigation, stated that the Florida sheriff's investigation had revealed that on May 13, 1982, Jay Betencourt, an employee of Barona's, met with Rodriguez and others in Tucson, Arizona, for the purpose of locating a suitable airstrip in southern Arizona to use for importing drugs (5/15/85 Tr. 195-196). The district court found that the failure to furnish the affidavit to the defense constituted a violation of *Brady* v. *Maryland,* 373 U.S. 83 (1963), because the affidavit suggested that the participants in the expedition were involved with the Barona organization rather than the Arnaiz organization. The court concluded, however, that the violation was not committed in bad faith, since the prosecutor had not been aware of the existence of the document earlier (5/15/85 Tr. 283-285; 5/16/85 Tr. 1-3).

The trial court also found that a second *Brady* violation had occurred as a result of the government's failure to furnish the defense, prior to the last day of trial, with an FBI report reflecting that an informant had described co-defendant Rodriguez in a manner inconsistent with his actual appearance (5/15/85 Tr. 280-282). Again, however, the court concluded that the violation was "probably just [a] good faith mistake[ ]" (Pet. App. 3).

In addition to the *Brady* violations, the trial judge ruled that the government had violated the Jencks Act, 18 U.S.C. 3500, as a result of its failure to furnish the defense with a tape-recorded summary of an interview with a government witness. Prior to trial, that summary had been lost. Pet. App. 3-4.

Finally, the trial judge found that, on several occasions, government witnesses violated the court's sequestration order by discussing their testimony with other witnesses. One incident, which resulted in the dismissal of charges against co-defendant Gregory Clifford, occurred when FBI agents, who had been called to testify on Clifford's behalf, discussed their testimony among themselves (5/13/85 Tr. 11-26, 105-106). Another incident occurred when, following his testimony, the DEA case agent telephoned the Marion County, Florida, deputy sheriff who executed the wiretap affidavit. The DEA agent informed the deputy sheriff that she would probably be questioned concerning information contained in the affidavit. He also told her that, while he was being cross-examined by the defense, he had learned that a government informant may have murdered two Americans in Mexico (5/15/85 Tr. 204, 208).

The violations of the trial judge's sequestration order and the failure to furnish *Brady* material prompted counsel for petitioners to move for dismissal of the charges (see, *e.g.*, 5/3/85 Tr. 4; 5/13/85 Tr. 66-67). Counsel for petitioner Bacallao repeatedly requested that, in the alternative, the district court declare a mistrial. He

stated that, "I move for a dismissal, but in the alternative, I now move for a mistrial. * * * I'd take a mistrial because I want[] a clean, untainted jury. Now I'm going to have a real mess on my hands. I want a new jury. * * * I want a jury who is going to hear untainted things." 5/13/85 Tr. 74; see *id.* at 75 ("I will gladly take a mistrial so I can come back here again"); *id.* at 107 ("[Y]ou've got to give me another jury, Judge"). Counsel for the remaining petitioners did not dissociate themselves from the mistrial requests even though the district court had stated at the outset of the trial that the motion of any defense attorney would be imputed to the co-defendants unless they indicated otherwise (4/18/85 Tr. 177).[3]

Ultimately, the trial judge granted the motions for a mistrial. He explained that the mistrial declaration was based upon the *Brady* and sequestration order violations (5/16/85 Tr. 2-4). Although counsel for petitioner Fromm stated that dismissal was the proper remedy, the remaining petitioners voiced no disagreement with the mistrial declaration (*id.* at 11).

Petitioners then filed motions to dismiss the indictment on double jeopardy grounds. The district court denied the motions following a hearing. Pet. App. 2-3. In the course of the hearing, the trial judge stated that he had declared the mistrial on the specific ground "that there was a manifest necessity" (*id.* at 2) to do it. He found the mistrial necessary because of the Jencks Act and *Brady* violations by the government and because of the improper communications between government witnesses. As an additional reason for the mistrial declaration, the court cited

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[3] Throughout the proceedings petitioners and their co-defendants repeatedly made motions for a mistrial (see Gov't C.A. Br. 25 n.5). During a post-trial hearing, the district court observed that the defendants "moved for more mistrials than a computer could keep track of" (*id.* at 22) and that "[t]here have been so many motions for mistrial, that after a while you become dulled to them" (1/13/86 Tr. 47).

repeated instances of improper comments and heckling by defense counsel, particularly counsel for petitioner Bacallao (1/13/86 Tr. 47-48). Summarizing his reasoning, the trial judge explained that "I just felt under the circumstances that in fairness to everybody, including both the Government and the defendants, that it was necessary to grant a mistrial" (1/13/86 Tr. 47-48).

2. The court of appeals affirmed. It held that although the matter was not free from doubt, the district court exercised sound discretion in declaring a mistrial on the basis of manifest necessity (Pet. App. 6). That action, the court reasoned, was warranted because of the district court's inability to cure the prejudice resulting from the government's *Brady* violations and the witnesses' failure to adhere to the sequestration order. In addition, the court observed that misconduct by defense counsel "contributed to the manifest necessity for a mistrial" (Pet. App. 9).

ARGUMENT

Petitioners contend (86-1842 Pet. 18; 86-1998 Pet. 16) that the district court abused its discretion by declaring a mistrial on the basis of manifest necessity and that, as a result, the Double Jeopardy Clause forecloses their retrial. That claim was properly rejected by the court of appeals and does not merit further review.[4]

In the first place, absent intentional misconduct by the government that is calculated to induce a mistrial, the Double Jeopardy Clause does not bar a retrial where the defendant elects to terminate the proceedings by requesting a mistrial. *Oregon* v. *Kennedy*, 456 U.S. 667, 672 (1982). This principle applies not only where the defendant expressly requests a mistrial, but also where consent to the termination of the proceedings is implicit from the circum-

[4] The petitioners in Nos. 86-6591 and 86-6637 raised substantially the same issues. We reiterate the arguments that we made in our responses to those petitions.

stances or where the defense accedes to a mistrial declaration by failing to object. See, *e.g., United States* v. *Buljubasic,* 808 F.2d 1260, 1265 (7th Cir. 1987), petition for cert. pending, No. 86-1608; *United States* v. *Smith,* 621 F.2d 350, 352 (9th Cir. 1980), cert. denied, 449 U.S. 1087 (1981); *United States* v. *Gordy,* 526 F.2d 631, 635 n.1 (5th Cir. 1976); *United States* v. *Beckerman,* 516 F.2d 905 (2d Cir. 1975); *United States* v. *Goldstein,* 479 F.2d 1061, 1067 (2d Cir.), cert. denied, 414 U.S. 873 (1973).

Throughout the trial, petitioners repeatedly requested that the proceedings be terminated by a mistrial declaration. When the violation of the court's sequestration order by a government witness was revealed, counsel for petitioner Bacallao expressly requested a mistrial (5/13/85 Tr. 74-75). The other petitioners did nothing to dissociate themselves from that motion, although the trial judge had earlier stated that, absent an expression of disagreement, he would consider any motion of one defendant to be adopted by the rest. Additionally, when the trial judge announced that "the motion for a mistrial is granted," counsel for petitioners Arnaiz and Bacallao lodged no objection to the declaration, although counsel for petitioner Fromm argued that the court should have gone farther and dismissed the charges altogether (5/16/85 Tr. 11). No petitioner expressed the desire to continue with the trial before the jury that had been empanelled, rather than having a mistrial. Under these circumstances, where the defendants have sought or acquiesced in the mistrial, where no defendant has asked to have the trial continue before the same jury, and where there is no showing of any intentional governmental misconduct designed to goad the defense into seeking a mistrial, the Double Jeopardy Clause does not bar a retrial. See, *e.g., United States* v. *Buljubasic,* 808 F.2d at 1265.

Even if petitioners had not acquiesced in the mistrial

declaration,[5] the Double Jeopardy Clause still would not preclude a retrial. When a mistrial is required by manifest necessity, the Constitution's protection against double jeopardy does not bar a retrial, even if the defendant opposes the mistrial declaration. *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). Moreover, because the trial judge is the "most familiar with the evidence and the background of the case on trial," his decision to declare a mistrial is entitled to great deference, and is not subject to reversal on appeal unless he acts "irrationally or irresponsibly." *Arizona* v. *Washington*, 434 U.S. 497, 514 (1978).[6]

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[5] Petitioners Bacallao and Fromm (86-1998 Pet. 8-10) maintain that, because the trial judge had earlier threatened to dismiss the case if there were further violations of the sequestration rule, his mistrial order, following a subsequent violation, was "functionally indistinguishable from a dismissal with prejudice," as opposed to a mistrial. The trial judge, however, made it plain that he did not intend to terminate the proceedings and that he contemplated that the defendants would be subject to retrial (5/16/85 Tr. 4-11). As the Court explained in *Lee* v. *United States*, 432 U.S. 23, 30-31 (1977), even if a court does not call its order a mistrial declaration, an order terminating a trial should be considered as such unless the order "contemplates an end to all prosecution of the defendant for the offense charged."

[6] Petitioners maintain (86-1842 Pet. 20; 86-1998 Pet. 10-14) that, because the government was responsible for the errors that triggered the mistrial declaration, the court of appeals erred in applying an abuse of discretion standard in assessing the propriety of the district court's order. As this Court explained in *Washington*, 434 U.S. at 513 (citation omitted), however, "[t]he adoption of a stringent standard of appellate review in this area * * * would seriously impede the trial judge in the proper performance of his 'duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop * * * professional misconduct.' " Nothing in *Washington* suggests that a deferential standard of review is inapplicable to cases involving improprieties on the part of the government, as long as the government's conduct is not calculated to harass or achieve a tactical advantage over the accused or to trigger the termination of the proceedings.

In this case, the trial judge determined that, in view of errors by government investigators, as well as misconduct by defense counsel, neither side could receive a fair trial. On the one hand, the court found that the belated disclosure of *Brady* and Jencks Act materials, coupled with the violations of the sequestration order, irreparably compromised the defendants' ability to pursue their defenses and to exploit material that could have impugned the veracity of government witnesses. On the other hand, the court determined that the government's right to a fair trial was infringed as the result of improper comments by defense counsel. Under these circumstances, a mistrial declaration, based upon manifest necessity, was well within the district court's discretion.[7] See, *e.g., Arizona* v. *Washington, supra* (approving mistrial declaration based upon defense counsel's improper and prejudicial remarks during his opening statement).[8]

See *id.* at 508; see also *United States* v. *Jarvis*, 792 F.2d 767, 769 (9th Cir. 1986), cert. denied, No. 86-135 (Oct. 6, 1986) (strict scrutiny standard applies when the defense claims that the mistrial was *intentionally* caused by the prosecution). In this case, the courts below concluded that the government's errors were unintentional. See Pet. App. 7.

[7] Petitioners Bacallao and Fromm maintain (86-1998 Pet. 14-16) that the manifest necessity standard for a mistrial declaration should be inapplicable in this case as the government had argued at trial that manifest necessity did not require termination of the proceedings. But as the Court explained in *Washington*, 434 U.S. at 516 (footnote omitted), the determination whether to declare a mistrial on the basis of manifest necessity rests with the sound discretion of the trial judge and not the parties. "Neither party has a right to have his case decided by a jury which may be tainted by bias * * *."

[8] Petitioner Arnaiz maintains (86-1842 Pet. 22-24) that the decision of the court below is contrary to *United States* v. *Smith*, 621 F.2d 350 (9th Cir. 1980), cert. denied, 449 U.S. 1087 (1981), and *United States* v. *McKoy*, 591 F.2d 218 (3d Cir. 1979), which hold that, prior to declaring a mistrial on the basis of manifest necessity, the trial judge must consider reasonable alternatives. The trial judge did, however, consider and reject as insufficient less drastic alternatives before he

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1987

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declared the mistrial. He stated that, although he had been able to cure a sequestration order violation in another case by limiting a witness's testimony, he did not believe that such a remedy would be effective here (5/16/85 Tr. 3-4). In any event, as the Court emphasized in *Washington*, 434 U.S. at 511, the fact that other district courts might have selected a remedy short of a mistrial declaration is not a basis for finding that the district court in this case abused its discretion in determining that a mistrial declaration was the only remedy sufficient to assure a fair trial.

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